SUPREME COURT, U.S.
DEC 27 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 912

LOYD CARL RAY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

LOYD CARL RAY, *Petitioner*
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Petitioner prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit.

CITATIONS TO OPINIONS AND ORDERS BELOW

The verdict of the United States District Court, Eastern District of Missouri, Eastern Division, appears in Appendix A, together with the Judgment on the Verdict. The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix B. The judgment

of the said Court of Appeals appears in Appendix C. The order denying appellant's Petition for Rehearing appears in Appendix D. The order of the appellate court staying mandate appears in Appendix E.

JURISDICTION

The judgment was entered on October 21, 1966, and a rehearing denied on November 22, 1966.

The United States Court of Appeals for the Eighth Circuit ordered a stay of issuance of mandate for a period of 30 days from and after November 28, 1966.

STATUTORY PROVISIONS

Point of law not yet decided by this Court. (Q. #1) In addition, there is no rule applicable to this precise case before the court.

QUESTIONS PRESENTED

1. Petitioner was deprived of his rights under the Criminal Justice Act of 1964, 18 U.S.C., Sec. 3006A, Subsection (e), as amended.

2. Trial court erred in making statements and comments with reference to the case, in the presence of the jury, which were prejudicial to the petitioner and deprived him of a fair and impartial trial.

3. Trial court erred in ignoring petitioner's motion for discovery and inspection at time of arraignment, and his motion for funds with which to transport witnesses.

4. Petitioner was deprived of his right to a fair and impartial trial due to prejudicial newspaper articles during and before trial.

5. Court erred in denying petitioner's motion for Bill of Particulars.

6. Appellate court erred in giving binding force to precedents not applicable to this case.

7. Petitioner was deprived of his right to effective assistance of counsel under the Sixth Amendment to the Constitution.

8. Petitioner was deprived of his right to a fair trial under Rules 17(b) and 15(c) of the Federal Rules of Criminal Procedure, relating to funds for indigents to secure witnesses for trial.

9. Trial court erred in admitting into evidence material of a questionable and improper nature.

10. Trial counsel was incompetent to try a case of this complexity, and the Court erred in appointing counsel who by his own words was not at all familiar with Criminal Law and Procedure, or with the Criminal Justice Act of 1964.

CONSTITUTIONAL PROVISIONS

AMENDMENT 6 TO THE CONSTITUTION OF THE UNITED STATES

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ob-

taining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Loyd Carl Ray was indicted on eleven counts of mail fraud under Title 18, U.S.C., Sec. 1341. The indictment was returned on the 23rd day of April, 1964.

The indictment was based upon allegations that Loyd Carl Ray, acting under an alias of Willard T. Morton, set up a scheme to defraud a number of citizens of St. Louis, Missouri during the months of October, November and December of 1963, by use of the mails. (See indictment and Bill of Particulars.)

The indictment specifically alleged that the said defendant, Ray, set up a scheme or artifice to defraud and for obtaining money by false fraudulent pretenses, representations and promises in that he (Ray), acting under the name of Willard T. Morton, did personally set up the Willard T. Morton Travel Agency in Room 208, 7603 Forsyth Blvd., in Clayton, Missouri; that he opened two bank accounts in the City of St. Louis, Misouri; that he hired two salesmen and a secretary, and placed ads in various newspapers to induce prospective purchasers to buy a tour to Hawaii for the sum of $485.00. Two such tours were scheduled for December of 1963, one called the Christmas Trip and the other the New Year's Trip. Prior to the scheduled departure dates of the tours, the travel agency closed and Willard T. Morton disappeared. None of the clients received tickets to go on the trip or any of their money back. In this connection, Morton was alleged to have used the mails to obtain the money in advance without ever having any intention of providing the tours. The government claimed that the defendant, Loyd

Carl Ray, was the same Willard T. Morton who perpetrated the fraud.

Defendant Ray testified that, prior to his arrest, he had never been in St. Louis, nor had he at any time used the name of Willard T. Morton. (p. 481, Reporter's Transcript, Vol. #2.) Ray further testified that he had in fact been in the City of Denver, Colorado, on each and every day during the time Morton was operating in St. Louis (i.e., October, November and December, 1963), and that he had witnesses who had seen him every day in Denver during this period; customers at his office, friends, business associates, etc.

Loyd Carl Ray was arrested in Denver, Colorado on March 14, 1964, and was brought before the U.S. Commissioner there. Ray was released on $5,000.00 bond and a preliminary hearing was set for mid-April. The preliminary hearing was postponed until May 11, 1964 at the request of the United States Commissioner. Said hearing was to be in Denver, Colorado, the place of Mr. Ray's residence.

Prior to the preliminary hearing, defendant Ray arranged for some 40 witnesses (Denver residents) to appear at the hearing on his behalf and subpoenas were issued on April 22, 1964.

However, on April 23, 1964 the indictment mentioned above was returned in St. Louis, Missouri, allowing no opportunity for Ray to clear himself at a preliminary hearing in Colorado. This was in spite of the fact that the United States Attorneys in both Denver and St. Louis had been notified of the many people who could place Ray in Denver during the time Morton was operating in St. Louis, and reminded of the gravity of the mistake in in-

dicting the wrong man. It is herein submitted to the court that the secret and (from the defendant's point of view) premature indictment was returned because of, rather than in spite of, said notification.

On Friday, May 1, 1964, defendant Ray was notified by a letter, dated April 30, 1964, from the United States District Court Deputy Clerk to appear the following Monday, May 4, 1964, at 10:00 a.m., before the United States District Court in St. Louis for arraignment.

On May 4, 1964 Ray came before the court for arraignment (Hon. John K. Regan, U.S. Dist. Judge). A plea of not guilty was entered to each of counts 1 to 11, inclusive. A motion for discovery and inspection pursuant to Rule 16, Federal Rules of Criminal Procedure, was made by Ray, speaking for himself. Said motion was ignored by the court. Ray also made a motion, speaking for himself, for funds with which to transport his witnesses from Denver to St. Louis. This motion was also ignored by the court.

The court appointed John M. Goodwin to represent the defendant, presumably under Rule 44 of the Federal Rules of Criminal Procedure.

The case subsequently came on for trial on the 14th day of September, 1964 (p. 2, Criminal Docket, U.S. Dist. Court, No. 64Cr87(3)). On September 17, 1964, at the hour of 11:15 p.m., the jury informed the court that they "could never reach a verdict," whereupon the court declared a mistrial, ordered the cause reset for trial (p. 3, Criminal Docket, U.S. Dist. Court, No. 64Cr87(3)). For reasons unknown, the court would not allow defense attorney to poll the jury, or even talk to any of the jurors, after the trial was over.

The cause came on regularly for trial on October 25, 1965, whereupon, on October 28, 1965, the defendant, Loyd Carl Ray, was convicted on nine of the eleven counts of indictment, to-wit: 1, 2, 3, 6, 7, 8, 9, 10 and 11. (p. 4, Criminal Docket, U.S. Dist. Court, No. 64Cr87(3).)

On November 19, 1965 defendant appeared before the United States District Court in St. Louis for sentencing. Defendant's motion for judgment of acquittal, or in the alternative, for a new trial, was denied. Loyd Carl Ray was then sentenced to a four-year term and a three-year term, to run consecutively, for a total of seven years.

The cause was appealed before the United States Court of Appeals for the Eighth Circuit, and argued on September 12, 1966. Judgment of the trial court was affirmed by appellate court on October 21, 1966.

Appellant's petition for a rehearing was filed on November 10, 1966. An order denying Petition for Rehearing was issued on November 22, 1966.

An order staying issuance of mandate pending certiorari proceedings in Supreme Court of the United States was entered on November 28, 1966.

REASONS FOR GRANTING THE WRIT

This petition is submitted in the hope that I am not laboring under a misapprehension in my belief that justice should and will prevail. The law ought not to be so inflexible as to send a man to jail for seven years for a crime he did not commit, simply because there is perhaps no legal "loop-hole," or more properly, reversible error. If there is error at all, a new trial should be granted if for no reason other than that seven years is a long, long time.

The appellate court states in the opinion, "The examination of the entire record shows . . ." The point is, that court did not have all of the facts in the case, any more than the jury had all the facts in the case. They had substantially only the government's side of it since the defendant was blocked at every turn from presenting his side, simply due to inexperience and lack of money, to say nothing of a prejudiced judge.

If the Supreme Court will not review this case, then an innocent man will go to prison and that is a very good reason for granting the writ.

ARGUMENT

Point 1 — Petitioner was deprived of his rights under the Criminal Justice Act of 1964, 18 U.S.C., Sec. 3006A, Subsection (e), as amended.

The defendant for all practical purposes was deprived of his rights under the Criminal Justice Act of 1964, 18 U.S.C., Sec. 3006A, as amended.

Subsection (e) of the Act clearly states that "expert or other services necessary to an adequate defense" shall be made available to an indigent defendant. The appellate court argues in the opinion that "It is somewhat difficult to grasp appellant's reasons" (for wanting fingerprint expert).

The importance of his own fingerprint expert to the defendant can be gleaned from the fact that there was no fingerprint evidence at the first trial, which ended in a hung jury. The first trial was fully one year after the alleged fraud was perpetrated. Then another year later, at the second trial, all of a sudden the prosecution had fingerprints. This was a full *two* years after the offense.

One must also consider that said fingerprints were on papers and checks which were handled by the defendant at the first trial, and one fingerprint was on a book purportedly given to the postal inspector by John Primm, a man who was a salesman in the scheme (p. 194, Reporter's Transcript, Vol. #1), who was actually an accessory to the crime, and who had every reason to "cooperate" with the postal inspector. Mr. Primm was not charged with anything.

The fingerprints were latent prints. It is submitted that a qualified expert would have found that the prints were not two years old, if he were asked to determine age.

The government contended that the fingerprints were not available at the first trial because a "new process which had just become known," with which to develop latent prints, was not known at the time of the first trial. This contention is contradicted by government witness Mooney (p. 335, Reporter's Transcript, Vol. #2).

Answer, "Yes, sir. This is a process developed by the Swedish scientist in *1954*, called ninhydrin, and this will develop a print. The age means nothing on a print." (emphasis added.)

Since the process had been known since 1954, there was ample time for the prosecution to use it between the time of the purported crime in December 1963, and the first trial in September 1964. It is taxing credulity a little to have fingerprints at the second trial, in October of 1965, when none could be found in 1963 or 1964.

The government further contended that certain of the documents upon which they had developed latent prints were not available to them before the first trial. However, most of the customers from whom the documents were

procured were named in the indictment as being the people defrauded. Government witness Kelley (p. 218, Reporter's Transcript, Vol. #1) testified that he gave the letter, Government Exhibits 144 and 145, to Mr. Schnicker on December 20, 1963. One must conclude that the government had the papers all the time, at both trials.

There are more examples, but the above will serve to show that an expert of his own would have been important to the defendant.

Point 2 — Trial court erred in making statements and comments with reference to the case, in the presence of the jury, which were prejudicial to the petitioner and deprived him of a fair and impartial trial.

It is conceded that the trial judge has a certain amount of latitude in the conduct of a trial, but it is respectfully submitted that reasonable norms were exceeded to the defendant's prejudice.

The influence of a trial judge upon a jury is necessarily and properly of great weight. (*United States v. Levi*, 177 F.2d 833 (7th cir. 1949 (Ind.)). In this connection it was held in the case of *United States v. Scott*, 257 F.2d 374 (7th cir. 1958) (Ill.)) that it was the duty of the trial judge to maintain an atmosphere of impartiality.

On page 268, Volume #1 of the Reporter's Transcript, the court made the statement that both he, the government's attorney, and the government's witness Wilson, all worked for the postal department. The Circuit Court considered this harmless error. How could this be harmless? (see Opinion.) I have been taught since grade school that the government was divided into three branches, the legislative, the executive, and the judicial. Yet the judge by his remark destroyed this fundamental

concept by stating that he was aligned with the executive branch of the government instead of the judicial. In addition, the jury could conclude from the court's remark in the alternative that the postal department was the judicial department.

In the appellate court's opinion Circuit Judge Lay states: "The (trial) court's comments that he was simply trying to see that 'justice was done' comes close to exceeding the bounds of judicial propriety when taken in full context of the situation. It is doubtful the trial judge *intended* it as such . . ." and "We submit the court's charge cannot rectify actual and real prejudice. However, the charge does make clear to the jury the court did not *intend* to influence . . ." (emphasis added.)

It is submitted that regardless of what the judge may have *intended,* it is what he *did* that counts. The record cannot show the tone of voice of this judge or his facial expressions. His friendliness and good will toward all of the government witnesses was as apparent as his hate for the defendant and all of his witnesses. He really should have disqualified himself because a lot of his friends were victims of the fraud and testified for the government (i.e., the Mayor, Dr. Clevenger, et al).

The appellate court overlooked Judge Regan's comments to government witness Herpel (p. 52-53, Reporter's Transcript, Vol. #1):

Recross — By Mr. Goodwin (defense attorney):

"Question: Well, with reference to this $4,000 check on December 13th, and the other one on December 12th for three thousand some odd dollars, that shows the actual cash was given?

"Answer: That indicates that he was.

"Question: That indicates he (Morton) was in there on those days, wasn't it?

"Answer: Yes.

"The Court: Just a minute. Just a minute. Now, does it indicate that he was in there, or that the check was cashed on that day?

"The witness: Well, the check, more likely the check was cashed."

Insight as to the judge's reason for wanting witness Herpel to change his testimony can be gained from the record of the first trial. Defendant Ray had a very good witness, Layton Dix (p. 456, Reporter's Transcript, Vol. #2) (not a relative), who would place him in Denver, Colorado on December 13th at almost the exact time of day when Morton was cashing a $4,000.00 check at his bank in St. Louis. Judge Regan of course remembered this from the first trial.

The appellate court's opinion states: "He (trial judge) should never assume the role of the prosecutor or advocate" and "However, his comments should never unfairly emphasize testimony nor add to or change the evidence given."

In the above example, the trial judge clearly caused the evidence given to be changed.

In the same opinion it is stated: "Counsel's attempt to end his cross examination on a strong point was virtually destroyed." (by trial judge.)

At every turn the appellate court concedes that the trial judge's comments were prejudicial, and yet excuses him by saying he didn't *intend* any harm.

The harm was done, whether he *intended* it or not.

I submit that the court's charge cannot rectify the damage or erase the prejudice from the minds of the jury.

The court's attention is directed to the Reporter's Transcript, Vols. #1 and #2, at the following pages, for further examples of the trial court's comments: Pp. 51, 52, 53, 60, 83, 191, 199, 203, 262, 268, 276, 281, 282, 285, 286, 287, 325, 326 (here the Court is misquoting evidence concerning no papers in the office, see pp. 13, 14 and 96 for proof), 327, 328, 419, 424 (here the court improperly sustained an objection to a question as being repetitious, when in fact it was not repetitious), 484 (rude), 493, 494, 517, 518, 521, and 531. The court's animosity can be seen even in the written word of the sentencing on pp. 559 and 560. "The Court (shouting): Tell us where the money went . . ."

The court's comment that he wanted to see that "justice was done" (p. 285, Reporter's Transcript, Vol. #1), clearly indicates to the jury that such justice could only be done by seeing to it that the defendant was convicted. Such indelible impressions as the above, upon the minds of the jury, cannot be removed by a simple statement in the charge that he "intended" no harm.

Chief Justice Fuller in *Starr v. United States*, 153 U.S. 164, says: "The influence of the trial judge on the jury is necessarily and properly of great weight, and that his *lightest word or intimation* is received with deference, and may prove controlling." (emphasis added.)

Point 3 — Trial court erred in ignoring petitioner's motion for discovery and inspection at time of arraignment, and his motion for funds with which to transport witnesses.

Defendant's motions should not have been ignored, even though they were perhaps improperly made. The court, in ignoring said motions, stated that he was going to appoint counsel for the defendant. However at this point defendant was not there to request counsel, but only to enter a plea of not guilty and to see about what evidence was against him and money to transport witnesses from Denver to St. Louis.

In a case of such importance to the defendant, it would seem that the court, if it truly wanted to see that "justice was done," would not ignore an indigent defendant's motion, simply because it was made in other than the usual form.

Point 4 — Petitioner was deprived of his right to a fair and impartial trial due to the prejudicial newspaper articles during and before trial.

The court erred in not instructing the jury to abstain from reading newspaper accounts of the trial, until after the damage had already been done. Said instruction to the jury was not made until the second day of the trial. By then the jury had seen both the morning papers, and evening papers from the day before. I think one may be sure that natural curiosity would cause any juror to read accounts of a proceeding in which he was involved.

The papers ran several columns every day concerning the trial. They stated among other things that *Ray* ran a travel agency in St. Louis. *Ray* hired certain employees, *Ray* did this and *Ray* did that, as if it were a fact. They also said that Ray had been arrested previously in Denver for the same offense (not true), and printed defendant Ray's picture with the caption "Willard T. Morton" under it. All of this was on the first day of the trial.

Point 5 — Court erred in denying petitioner's motion for Bill of Particulars.

By denying said motion the court effectively blocked defendant's chances for exercising his rights under the Criminal Justice Act as it pertains to expert witnesses. How could defendant use or ask for such experts if he did not know he needed them until it was too late?

Point 6 — Appellate court erred in giving binding force to precedents not applicable to this case.

It is a salutary rule of precedent making that a court can give no binding force to a rule wider than is fairly necessary to decide the actual case before it. In the opinion, Appellate Court states: "This court cannot but observe appellant wears shoes similar to a party seeking a new trial on newly discovered evidence under Rule 33. Such evidence not only must be material, but it must be shown that on a new trial it would probably produce an acquittal." And "Hindsight can always produce other witnesses who could have been called," and "We necessarily cannot even know what such experts might say."

The court here apparently missed the point of the entire argument. There is no contention that defendant's evidence is newly discovered, but rather that he was deprived of a fair trial because he was not financially able to present what evidence he had.

Hindsight is not involved at all. Defendant repeatedly asked counsel to try to obtain funds for experts, both for handwriting and fingerprints, and to bring his witnesses from Denver to St. Louis. Defendant was advised that such request had been made to the trial judge (in chambers) and that the judge said "no." The fact that some

of these motions do not appear in the record goes to point #10, concerning incompetent counsel.

As for the quixotic contention that "we necessarily cannot even know what such experts might say," it is submitted that the defendant knows very well what they might say, since he is in a position to know first hand that he did not in fact put his fingers on any of the documents presented by the government, except perhaps through the trickery of the Postal Inspector and/or the District Attorney, in that they had these documents laying around on the table during the first trial, for the defendant to handle. See p. 218, Reporter's Transcript, Vol. #1, wherein Government witness Kelley testified he gave said documents to Postal Inspector Schicker immediately after the offense on December 20, 1963. Inspector Schicker had these documents in his possession for a year. He had them before, during, and until a few days after, the first trial, when he then sent the documents by registered mail to the fingerprint expert for examination. The documents were received by the fingerprint examiner on September 26, 1964 (p. 294, Reporter's Transcript, Vol. #2). The first trial was over on September 17, 1964. In that event, the fingerprints would necessarily be one year too new to be useful. (Dating from the time of the first trial, one year after the offense.)

Point 7 — Petitioner was deprived of his right to effective assistance of counsel under the Sixth Amendment to the Constitution.

Assistance cannot be effective unless counsel is allowed to present all of his client's case. Lack of money should not cause a man to be unjustly convicted. For all of the reasons herein named, it is submitted that defend-

ant had no assistance at all except for the "cross examination" ability of his attorney.

Point 8 — Petitioner was deprived of his right to a fair trial under Rules 17(b) and 15(c) of the Federal Rules of Criminal Procedure, relating to funds for indigents to secure witnesses for trial.

Assuming (but not admitting) the appellate court is correct in arguing that petitioner's right to a fair trial was not denied under the Criminal Justice Act because (p. 46, Opinion):

> "The benefits granted under subsection (e) of the Criminal Justice Act are similar to Rules 17(b) and 15(c) of the Federal Rules of Criminal Procedure. Each of these provisions relate to funds for indigents to secure witnesses for trial." And "If such services were deemed necessary, appellant could have made a request to the court . . ."

then it follows that his rights under said Federal Rules of Criminal Procedure were denied, because the fact remains that the defendant could not afford to bring his 40 witnesses to the trial.

There cannot be a fair trial unless both sides are heard. The importance of witnesses when the defense is alibi and mistaken identity cannot be over-emphasized.

Government witness Holden (p. 97, Reporter's Transcript, Vol. #1), testified Morton was in his office in St. Louis every day, "Five, six days a week." Defendant Ray's forty witnesses (see Fletcher, 40 affidavits, p. 365, Reporter's Transcript, Vol. #2), would have placed him in Denver, Colorado every day during this same three-month period. Since there is not even a direct air flight between

Denver and St. Louis, it is not possible to be in both cities on the same day, during business hours (p. 472, Reporter's Transcript, Vol. #2). One can conclude that a jury would acquit Mr. Ray if they had an opportunity to hear all of the facts.

The Court's attention is directed to the Supplemental Addendum to the Record, where certain of the above-mentioned forty affidavits are reproduced as examples of what defendant's witnesses would have said at the trial. Many of the dates specifically mentioned, placing Ray in Denver, are in direct conflict with Government evidence placing Morton in St. Louis, such as the dates Morton opened bank accounts, etc.

The appellate court's contention that had the defendant wanted these witnesses, "depositions could have been taken, or subpoenas issued, all at government expense," (footnote 6 of the opinion), overlooks the fact that the defendant asked for funds for witnesses at his arraignment. Defendant's counsel, Mr. John Goodwin, again asked the judge at the first trial, and was told the motion would be denied and therefore did not ask again at the second trial. Admittedly Mr. Goodwin should have made another motion at the second trial, for the record, but this goes to Point #10, concerning incompetent counsel.

The point here is that it should be self-evident to anyone that the defendant would want his witnesses. Except for the lack of money, they would have testified and the whole thing would have been over at the first trial.

A technicality, such as a motion not appearing in the record, should not prevent a new, and this time fair, trial.

Point 9 — Trial court erred in admitting into evidence material of a questionable and improper nature.

The importance of deciding which evidence is proper or improper can be readily seen. The fingerprint evidence presented at the second trial in October of 1965 was not presented at the first trial in September of 1964. The alleged fraud occurred in October, November and December of 1963. After the offense in 1963, after Morton disappeared with the money, defendant Ray was not identified and apprehended because of fingerprints, even though his fingerprints are on record due to his service record in both the U.S. Marine Corps and the U.S. Navy.

If the fingerprints were genuine, and if in fact it was possible to determine that they even belonged to Ray, then why the great time lapse? Ray was not even arrested until March of 1964, and then for very questionable reasons, but those reasons are outside the scope of this particular argument.

If the fingerprints were actually made at the time of the offense and it could be determined that they were Ray's, it would seem that he would have been identified and arrested immediately. Particularly, since there has never been any mystery about his whereabouts. He has resided in Denver for the past 16 years, and at the same address in Denver for the past eight years.

The question of the time lapse between the offense and arrest would perhaps be easier to explain than the question of why no fingerprint evidence was available at the first trial. A full year is more than ample time for the government to develop a fingerprint, if any existed.

The government's contention that Postal Inspector Schicker obtained the documents only after the first trial was over is ridiculous. In addition to the fact that the people from whom he obtained said documents were named

in the original indictment, consider the testimony of government witness Kelley (p. 218, Reporter's Transcript, Vol. #1) concerning government exhibits 144 and 145, upon which fingerprints are alleged. Mr. Kelley testified he gave these documents to the Postal Inspector Schicker on December 20, *1963*. Mr. Schicker did not turn these documents in to the laboratory until a few days *after* the first trial, i.e. September 26, 1964 (p. 294, Reporter's Transcript, Vol. #2).

The following objection by defense counsel will be found at pp. 295-296, Reporter's Transcript, Vol. #2: "A —I received these exhibits from Inspector Schicker, and was requested to conduct an examination to determine if any latent fingerprints could be developed on any of these exhibits. Along with that request, I processed Government's Exhibits 144 through 148 with a ninhydrin process to develop latent fingerprints, and several latent fingerprints were developed on these exhibits, sir."

Mr. Goodwin—"If the Court please, before we get any further into this, I want to object to it for the reason that there is no showing of where these documents were, other than the fact that he received them in the mail from Postal Inspector Schicker. There has been no showing other than where the documents were originally obtained, but nothing with reference to where they have been in the meantime, in whose possession, and what was done with them."

All of the documents upon which fingerprints are alleged are transportable, which causes them to be questionable and improper in themselves.

On page 191 of the Reporter's Transcript, Vol. #1, defense counsel Goodwin objected thus: "If the court

please, it speaks for itself. It is simply a typewritten note. It hasn't any signature or anything else on it. It is a typewritten note. He has no way of knowing who typed this."

Whereupon the court proceeded with its own direct examination of the witness, as was its custom, and later admitted the questionable note into evidence.

The appellate court apparently overlooked the government's new witnesses and conflicting testimony when they state in the opinion: "In the second trial the government used the same lay witnesses and produced two new witnesses who were handwriting and fingerprint experts as well." (p. 33 of the Opinion), and "Outside of the testimony concerning the fingerprints, it is agreed the evidence produced at both trials was generally the same." The following three government witnesses are examples of new and untrue testimony.

Mr. McGowan (p. 161, Reporter's Transcript, Vol. #1), is the man who runs the Mainlander night club, where Morton's pre-tour party was arranged. Obviously, the government and everyone else knew about Mr. McGowan from the beginning, and yet he did not testify at the first trial. The reason was that McGowan did not identify defendant Ray's picture as being Morton. (p. 379, Reporter's Transcript, Vol. #2.) Upon learning this, Ray called upon Mr. McGowan during the time of the first trial (Fletcher, p. 378, Reporter's Transcript, Vol. #2), in the hope that he (McGowan) would testify for the defense, since he knew Morton and did not believe Ray was the same person. However, although he knew Ray was not Morton, Mr. McGowan did not want to "get involved." Upon advice of counsel, defendant did not subpoena McGowan because he would have been at best a reluctant witness.

During cross examination at the second trial, McGowan was asked by defense counsel (p. 170, Reporter's Transcript, Vol. #1), "In other words, the *first* conference that you ever had with the Postal Inspector was after the trial last September; is that your testimony?"

Answer — "Yes."

Question — "Well, then how is it the Postal Inspector came out to see you after the last trial, and not before?"

Mr. Gilmore (District Attorney) — "Your Honor, I will object to that."

The Court — "It will be sustained."

The court here sustained an improper objection. More important, the question remains unanswered. Why indeed would the Postal Inspector not contact perhaps one of the prime witnesses for his case?

It is submitted that McGowan was probably number one on Inspector Schicker's list of people to contact, back in December of 1963. Because McGowan refused to identify Ray as being Morton, he was not called to testify for the government. From this there is the inescapable conclusion that the government, or at least the people working for the government on this case, were not at all interested in the truth, or justice, or the "whole story," but rather only in a conviction. In this connection, there must have been dozens of people in St. Louis who had dealings with Morton, but who would not identify Ray as being the same man and therefore were not called to testify. The government's testimony brought out that Morton rented an office, an apartment, placed newspaper ads, had a telephone installed, organized parties, did his banking, lived and worked in St. Louis for at least three months that we

know of. Where then were all of these people? The other tenants of the office building, or at least the landlord or manager? Same thing concerning the apartment building where he lived; the people from the newspaper, etc.? Out of all the people in St. Louis, the government called very few witnesses to identify Ray. Even some of the people from the banks were not the people who actually cashed Morton's checks. They *saw them being cashed* from a distance. (p. 40, Reporter's Transcript, Vol. #1.) One must conclude that all these other people contacted in the government's investigation would not identify defendant Ray as being Morton.

In the example of McGowan above, it can be seen that Inspector Schicker was able to get him to change his opinion and testify at the second trial, after all. That the methods used to effect such a change in McGowan's testimony were probably questionable can be seen in the earlier example of manufacture of fingerprint evidence.

The court commented that it did not think Inspector Schicker was a villain (p. 558, Reporter's Transcript, Vol. #2), and that Mr. Schicker was a "career postal worker," trying to do his job, to whom it makes no difference "whether anybody is convicted or not." This was the understatement of the year. Judge Regan apparently thinks that being a career postal worker makes one pure as the driven snow, but I doubt it. If Mr. Schicker is not the villain, then *someone* certainly is, because these things do not just happen all by themselves.

Mr. Gross (p. 212, Reporter's Transcript, Vol. #1) also did not appear at the first trial. He was a janitor who cleaned Morton's office. His testimony stated that upon leaving town with all the money Morton told him he was going home to "Denver." He then proceeded to iden-

tify Ray as Morton. Is it really necessary to say this testimony was "made up?" Just consider the big confidence man leaving with all the loot, telling the janitor he is going home to "Denver."

At the first trial, a teller from the Del Mar Bank testified he cashed a check for $4,000.00 for Mr. Morton, in person, on Friday, December 13, 1963. The teller's name was Mr. Tonsing, I believe, and he placed the time of day at about 1:30 p.m. Mr. Tonsing said he knew Morton quite well, well enough in fact that he did not need to require any identification before cashing a $4,000.00 check for him. This teller did *not* identify Ray as Morton.

At the second trial, the above described teller did not appear; another teller (Hartwell, p. 63, Reporter's Transcript, Vol. #1), testified that *he* cashed the same check for Morton while Mr. Tonsing was out to lunch. This second teller, Hartwell, did identify the defendant as being Morton. The first teller could not be located by the defense. It is submitted that this was "improper," to say the least.

Point 10 — Trial counsel was incompetent to try a case of this complexity, and the Court erred in appointing counsel who by his own words was not at all familiar with Criminal Law and Procedure, or with the Criminal Justice Act of 1964.

The appellate court had no right to assume defense counsel, John Goodwin, was familiar with the new Criminal Justice Act of 1964, when by his own words he was not (p. 266, Reporter's Transcript, Vol. #1). (Also see Supplemental Transcript of Record "This is a somewhat unfamiliar role for me.") The court also makes much of the fact that all of the services (for experts and funds for witnesses) were available with or without the Act.

(Opinion, footnote #6): "Such a contention overlooks Rules 15(c) and 17(b) of the Fed. R. Crim. P. Upon counsel's ex parte application, within the court's discretion, depositions could have been taken, or subpoenas issued, all at government expense."

(Opinion, footnote #7): "However, such services were available . . ."

(p. 44, opinion): "Trial counsel did not at any time request handwriting or fingerprint experts before, during or after the trial."

(p. 45, opinion): "Yet no request to hire experts was made."

(p. 46, opinion): "If such services were deemed necessary, appellant could have made a request to the court . . ."

(p. 46, opinion): "Yet the record is absent any request made . . ."

It is submitted that if indeed such services were available, then they not only could have been requested, but *should* have been requested.

Mr. Goodwin was asked repeatedly by the defendant to petition the court for funds for such services. The defendant was told by Mr. Goodwin that he had in fact made such a motion and that it had been denied by the court. Later it was discovered that said motion was not in the record. Mr. Goodwin then said he had asked the judge in chambers about funds for witnesses and was informed by Judge Regan that they would be refused. It is submitted that said motions should have been made anyway, for the record. It is also submitted that Mr. Goodwin should not have lied to the defendant concerning the fact

that the motions had been made. Defendant would have made the motion himself if he had known Mr. Goodwin had not done so.

Mr. Goodwin made practically no objections to the questionable evidence and practices of the government throughout the trial. The appellate court in the opinion states, "There was no objection made at the time of this examination," in discussing some of the trial court's comments.

Mr. Goodwin withdrew an important objection to some fingerprint evidence after a colloquy among the court and counsel (p. 296, Reporter's Transcript, Vol. #2). This objection should not have been withdrawn.

All of the government's exhibits were received without objection and there was no objection to the charge.

Mr. Goodwin's lethargic attitude can be seen in his motion for a directed verdict of acquittal (p. 343, Reporter's Transcript, Vol. #2), when he ended said motion with, "I guess."

On pp. 44-45 of the opinion the appellate court said "It is taxing credulity to say trial counsel was 'caught by surprise' by such evidence. His cross examination demonstrates a thorough technical knowledge of the subject." (fingerprints.) The court goes on to point out the several technical terms used by Mr. Goodwin. However, upon reading the direct examination of this particular witness, one will find that such terms had already been used so that even the jury understood them. When the U.S. Marshal testified (p. 239, Reporter's Transcript, Vol. #1), that he had fingerprinted the defendant, Mr. Goodwin said that he guessed he'd have to read up on fingerprints during his lunch hour. This was the extent of his so-called technical knowledge.

Mr. Goodwin is perhaps a fine civil lawyer. The petitioner would have no way of knowing. However, this case was his first and only criminal case in a Federal court. He relied upon his wits and his ability to cross examine, and was pretty good at it, at times, particularly during the first trial when he still had a certain amount of enthusiasm left. He should have been replaced by the court for the second trial. He had already done a lot of work, and just seemed to "run out of steam," at the second trial. Had he even made just a couple of simple motions for witnesses, the verdict would have been different. If he was not incompetent, then he was at best indifferent.

The appellate court engaged in a flowery dissertation on the last page of the opinion in which they say "the lawyer is the master of his client's case," and "His decision becomes his client's command, his judgment must necessarily guide his client's destiny."

It is submitted that his client should not necessarily be bound by counsel's judgment, when such judgment is so obviously wrong.

CONCLUSION

For the foregoing reasons, and for the reason that every man has an absolute right to personal freedom and to reputation, this petition for a Writ of Certiorari should be granted.

Loyd Carl Ray

LOYD CARL RAY, *Petitioner*
1225 South Birch Street
Denver, Colorado 80222
Telephone 757-1076

Appearing for himself

Appendix A

VERDICT OF THE TRIAL COURT

October 28, 1965

"(Following the recess for dinner, the jury resumed its deliberations. At 9:45 P.M., a verdict of guilty was returned. At the request of counsel for the defendant, the jury was polled, and the verdict was found to be unanimous.)". (p. 557, Reporter's Transcript, Vol. #2.)

JUDGMENT ON THE VERDICT

November 19, 1965

"THE COURT: Defendant's motion for judgment of acquittal, or in the alternative, for a new trial, has been considered by the Court and overruled in all respects. We are now here for sentencing. Mr. Goodwin, do you have anything to say before sentence is passed?" (p. 558, Reporter's Transcript, Vol. #2.)

"All right, Loyd Carl Ray, if you have nothing further to say, the Court now sentences you, in accordance with the verdict which was returned into this court on October 28, 1965, finding you guilty in Count One, and the Court sentences you to serve four years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law.

"On Count Two, in accordance with the verdict of the jury, the Court now sentences you to serve three years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to be consecutive to the sentence imposed in Count One;

however, the sentence in Count Two will be pursuant to the provisions of Section 4208 (a) (2), which gives the prison authorities the right to determine when you will be released.

"Pursuant to the findings of the jury in the verdict returned in this court on October 28, 1965, in relation to Count Three, the Court now sentences you to serve four years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to run concurrently with the sentence imposed in Count One.

"In relation to Count Six, pursuant to the verdict of the jury finding you guilty, returned into this court on October 28, 1965, the Court now sentences you to serve three years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to run concurrently with the sentence imposed in Count Two, but consecutive to the sentence imposed in Counts One and Three, but to be served according to the provisions of Section 4208 (a) (2).

"In Count Seven, pursuant to the verdict of the jury finding you guilty, returned into this court on the 28th day of October, 1965, the Court sentences you to serve four years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to run concurrently with the sentence imposed in One and Three.

"Count Eight, pursuant to the verdict of the jury, finding you guilty, returned into this court on the 28th day of October, 1965, the Court sentences you to serve

three years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to run concurrently with the three-year sentence but to be in accordance with Section 4208 (a) (2) of the United States Code.

"Count Nine, pursuant to the verdict of the jury finding you guilty, returned into this court on the 28th day of October, 1965, finding you guilty, the Court now sentences you to serve four years in the custody of the Attorney General of the United States, there to remain until said sentence is complied with or you are released by due process of law; this sentence to run concurrently with the other four-year sentences.

"In relation to Count Ten, pursuant to the verdict of the jury finding you guilty, returned into this court on the 28th day of October, 1965, the Court now sentences you to serve three years in the custody of the Attorney General of the United States; there to remain until said sentence is complied with or you are released by due process of law; this sentence to run consecutively to the four-year sentence, but to be pursuant to Section 4208 (a) (2), Title 18, United States Code.

"In relation to Count Eleven, pursuant to the verdict of the jury finding you guilty, returned into this court on the 28th day of October, 1965, the Court now sentences you to serve three years in the custody of the Attorney General of the United States, there to remain until said sentenee is complied with or you are released by due process of law; this sentence to be consecutive to the four-year sentence, but be in accordance with the provisions of Section 4208 (a) (2), for a total of seven years." (pp 560-563, Reporter's Transcript, Vol. #2.)

Appendix B

United States Court Of Appeals
For The Eighth Circuit

No. 18,235.

Loyd Carl Ray, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 21, 1966.]

Before VOGEL, Chief Judge, VAN OOSTERHOUT and LAY, Circuit Judges.

LAY, Circuit Judge.

Loyd Carl Ray was indicted on eleven counts of mail fraud under Title 18, U.S.C., § 1341 in April of 1964. The indictment charged that Ray acting under the alias of Willard T. Morton, set up a scheme to defraud a number of citizens by use of the mails. The scheme involved was to induce prospective purchasers to buy tours to Hawaii. A travel agency office was set up in St. Louis. Two salesmen and a secretary were hired by Morton. Brochures and various mailings were sent out to attract a clientele. The tours cost $485.00 each and were scheduled for December of 1963. Just before the trips were to take place, one called the Christmas Trip and the other the New

Years Trip, the pre-trip parties were called off. The clients never received any tickets to go on the trip or any of their money back. The travel agency closed and Morton disappeared. The government claimed there was never any intention to provide the tours and that the defendant, Loyd Carl Ray, was the same Willard T. Morton who perpetrated the fraud.

Ray denied that he was Willard T. Morton and also denied that he was ever in St. Louis during the time the mail fraud took place. He produced relatives and lay witnesses to establish that he was in Denver at all times in question. Ray operated a travel agency in Denver during the same period of time (October-December, 1963).

This case was originally tried in September 1964, and ended in a hung jury. A new trial was ordered. On October 25, 1965, the second trial began. A jury returned a verdict against the defendant Ray on nine of the eleven counts of the indictment.

Mr. John Goodwin, a St. Louis attorney, was appointed in 1964 to represent Mr. Ray before the first trial. He acted as defense counsel in both trials. During the course of the second trial Mr. Goodwin was reappointed under the Criminal Justice Act, Title 18, U.S.C. § 3006A as amended.[1] Mr. Ray at that time qualified as an indigent under the Act. Appellant has retained other attorneys to perfect this appeal.

Prior to the first trial, a motion for a bill of particulars under Fed. R. Crim. P., Rule 7(f) was submitted on behalf of Ray, which contained the following inquiry:

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[1]The Criminal Justice Act was passed August 20, 1965. On May 4, 1964, the court appointed John Goodwin to represent the defendant Ray under Rule 44 of the Fed. R. Crim. P. For authority of such reappointment see **Pope v. United States**, 251 F.Supp. 234.

"Please state the basis upon which it is alleged in the indictment that the said Willard T. Morton is the same person as the defendant Loyd Carl Ray?"

The court sustained the government's objection to this question. No further motion for a bill of particulars was filed before the second trial. No error is alleged herein as to the court's ruling on the first bill of particulars submitted.

In the first trial the government used certain handwriting experts, as well as a number of lay witnesses, who identified Ray and Morton, the proprietor of the Willard T. Morton Travel Agency, to be one and the same person.

In the second trial the government used the same lay witnesses and produced two new witnesses who were handwriting and fingerprint experts as well. These experts, Simeon Wilson from Chicago, Illinois, and Donald Gilbert Mooney of Washington, D. C., were both connected with the Post Office Department Identification Laboratory. They compared Ray's handwriting with that of Morton and determined that they were written by the same hand. In addition, they testified that Ray's fingerprints were the same as those taken from certain documents and a book that had been in the possession of Morton in St. Louis. Outside of the testimony concerning the fingerprints, it is agreed the evidence produced at both trials was generally the same.

Appellant raises two points of error on this appeal. First, the court erred in making certain comments prejudicial to Ray depriving him of a fair and impartial trial. Secondly, the appellant was deprived of his rights under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e), as amended.

Appellant calls our attention to the trial court's examination of the first witness Shannon. After recross examination the following questions and answers took place:

"The Court: Now Mr. Goodwin is asking you about Morton, and Mr. Gilmore is asking you about the defendant. Do you distinguish between Morton and the defendant?

"The Witness: I think I did in relation——

"The Court: Are they the same person?

"The Witness: They are the same person, as far as I am concerned. Yes, sir.

"The Court: All right.

"The Witness: Mr. Ray is Morton to me.

"The Court: Any other questions, gentlemen?

"Mr. Gilmore: No further questions.

"The Court: All right. Step down."

There was no objection made at the time of this examination.

It is obvious from this interrogation the trial court wanted to know if the particular witness distinguished between Morton and the "defendant", Ray. One of the chief roles of the trial judge is to see that there is no misunderstanding of a witness's testimony. The judge has a duty to comprehend what a witness says as much as it is his duty to see that the witness communicates with the jury in an intelligible manner. A trial judge can do this in a fair and unbiased way. His attempt to do so should not be a basis of error. Where the testimony is confusing or not altogether clear the alleged "jeopardy" to one side caused by the clarification of a witness's statement is certainly outweighed by the desirability of factual understanding. The trial judge should strive toward verdicts of fact rather than verdicts of confusion. There is

certainly no error on this point. *McCoy v. Blakely*, 217 F.2d 227; *Nat'l Dairy Products Co. v. United States* 350 F.2d 321 (1961).[2]

During the course of the cross examination of the expert Wilson, Mr. Goodwin asked the witness:

"Q. And you and Mr. Schicker (post office inspector) actually have the same employer, do you not, sir?

"A. Sure.

"Q. Post Office?

"The Court: So does Mr. Gilmore (government prosecuting attorney) and so do I.

"Mr. Goodwin: Well, I don't—that is all."

After recross by Mr. Goodwin with the expert Wilson, the court questioned the witness. Appellant contends this is further error. The court's interrogation was prompted by Mr. Goodwin's last question to the witness, which was as follows:

"Q. What you were saying is that you were trying to say that there is a mathematical probability here. It is by no means a certainty?

"A. That would be correct."

The court then asked the following questions:

"The Court: Well, it is a mathematical probability based on your judgment as an expert in this field, isn't it?

"A. This is correct.

"The Court: And have you ever found where these mathematical probabilities existed——

"Mr. Goodwin: If the Court please, I'd like to object to this.

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[2]In the McCoy case, Chief Judge Vogel said:
"A trial judge has not only the right, but also the duty to guide and lead the jurors in the interests of justice." 217 F.2d at 233.

"The Court: Well, I want to get it straight in the record. Go ahead and make your objection.

"Mr. Goodwin: My objection has been covered by counsel for the Government and by myself. I think the Court unduly emphasizes something which the Government is trying to emphasize, and gives weight to it.

"The Court: The Court has the duty, Mr. Goodwin, to see that *justice is don,* and that is what the Court is attempting to do. (our emphasis)

"Mr. Goodwin: If the Court please, I meant no disrespect. I meant no disrespect to Your Honor.

"The Court: I am just telling you what I am going to do, and I got it in the record so we don't have any mistake about our respective positions.

"Mr. Goodwin: My objection again to his Honor's comment.

"The Court: Now, Mr. Wilson, based on this mathematical probability, have you an opinion as to whether or not these prints were made by the same finger, or thumb in this case?

"The Witness: May I put it this way, Your Honor? The possibility that these two patterns could occur coincidentally in the hands of two different individuals is so remote as to be unworthy of any serious consideration."

Counsel's attempt to end his cross examniation on a strong point was virtually destroyed. But Mr. Goodwin perseveres and succeeds when, in a few short additional questions, the witness admits:

"In the final analysis, this is for the jury to decide whether the prints are in fact identical or not."

The error raised is not so much the examination by the court but the fact the court stated he wanted to "see that justice was done."

A federal judge has the right to comment fairly upon the evidence. *Kansas City Star v. United States,* 240 F.2d 643, cert. denied 354 U.S. 923; *Woodring v. United States,* 311 F.2d 417; *Batsell v. United States,* 217 F.2d 257. Such right is derived from the common law. *Vicksburg Railroad v. Putnam,* 118 U.S. 546 (1886); *Capital Traction Co. v. Hof,* 174 U.S. 1 (1898). The court in the *Putnam* case states:

> "In the courts of the United States as it is in those of England from which our practice is derived the judge in submitting a case to the jury may at his discretion whenever he thinks it necessary to assist them in arriving at a just conclusion, and upon the evidence call their attention to parts of it which he thinks important and express his opinion upon the facts; . . ."

However, as we have pointed out in the *Woodring* case, this is a right which the trial court must cautiously exercise since it can very easily result in prejudice to a litigant's rights. This is particularly true in a criminal case where life or liberty may be in jeopardy. The trial court's comments can disturb the balance of fairness of a jury trial. He should never assume the role of the prosecutor or advocate. His position is one of neutrality and he should never cross boundaries. It is a trial judge's duty to see that the evidence is clear and understood. However, his comments should never unfairly emphasize testimony nor add to or change the evidence given. The judge's zeal to do so when the evidence is evenly balanced can easily create prejudice. Each case merits individual

consideration. It may well be the less comment or interference by the trial judge with the examination of witnesses, the less opportunity for prejudice to basic rights to a fair trial. *Woodring v. United States,* supra; *Boatright v. United States,* 105 F.2d 737; *Stoneking v. United States,* 232 F.2d 385.[3]

The statement by the trial judge that the expert witness worked for the same employer as the court is certainly a harmless one. At best it could have been avoided, but we fail to see this statement constitutes error. If such a comment would so influence a jury, then the intelligence and independence of a jury no longer deserves our confidence.

The court's comments that he was simply trying to see that "justice was done" comes close to exceeding the bounds of judicial propriety when taken in full context of the situation. It is doubtful the trial judge intended it as such, but the court's examination could lend itself to the appearance that the court was emphasizing, through one of the government's witnesses, a contention of the government, to-wit, that the fingerprints were made by the same person as the defendant. It would seem from the record that the court did not have to intervene with his questioning at all at this point. There was not the need for clarification here, as existed in his examination of the witness Shannon. The court did instruct at the conclusion of the case as follows:

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[3]See excellent symposium, "The Right Of A Judge To Comment On The Evidence In His Charge To The Jury." 6 F.R.D. 317 (1947), wherein Chief Justice Fuller in Starr v. United States, 153 U.S. 614 is quoted as saying:

"The influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

"Therefore if during this trial you have imagined or gained the impression that the court had any opinion in regard to this case so far as the facts are concerned dismiss that impression from your mind because the court meant to express neither by manner nor by voice any opinion on the facts."

We submit the court's charge cannot rectify actual and real prejudice. However, the charge does make clear to the jury the court did not intend to influence their decision in any way.

It is significant the trial court did not, during the presentation of the testimony or during his charge to the jury, express any opinion as to the facts or comment directly upon the witnesses and their testimony. We feel the recross examination by Mr. Goodwin, when the expert witness admitted: "in final analysis, this was for the jury to decide," fairly brought the issue back into proper focus. We find no prejudicial error in the comments made, or in their accumulative effect.*

The second point of reversal appellant relies upon is that the defendant was deprived of his rights under the Criminal Justice Act. of 1964, §§ (e) as amended.

Subsection (e) reads:

"Services other than counsel—Counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are neces-

*The harmless error statute, Rule 52(a), means that a criminal appeal should not be turned into a quest for error. Bihn v. United States, 328 U.S. 633.

sary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained . . ."

Trial counsel was appointed to act for appellant under the Criminal Justice Act during the second trial in October 1965. The second trial commenced on October 25, 1965. At noon on October 27, 1965, and before the government rested, Mr. Goodwin was reappointed counsel under the Criminal Justice Act.

Appellant argues he was not able to take advantage of his rights under §§ (e) of the act, specifically to obtain fingerprint experts to testify for the defense. It is somewhat difficult to grasp appellant's reasons, but apparently he raises two: (1) Appellant was not timely informed fingerprint experts were to be used by the government (the government did not use them in the first trial in 1964).[5] (2) Assuming (but not admitting) appellant's trial counsel was forewarned concerning the government's fin-

[5]Although not raised as a point of error evidently, appellant is indirectly challenging the trial court's refusal to require the government to set out in detail the list of witnesses, or to require them to inform the defendant there were fingerprint experts. This court has long held that the granting or denial of a motion for a bill of particulars is within the sound discretion of the trial court and that its ruling will not be disturbed except for clear abuse of that discretion. **Kansas City Star Co. v. United States**, 240 F.2d 643, cert. denied 354 U.S. 923; **Todisco v. United States**, 298 F.2d 208 (1961).

A bill of particulars under Rule 7(f) is granted to particularize a charge involved and is clearly not an instrument to require the government to disclose its evidence. **Cooper v. United States**, 9 Cir., 282 F.2d 527, 532; **Cordova v. United States**, 10 Cir., 303 F.2d 454; **United States v. Hanlin**, D.C. Mo., 29 F.R.D. 397; **United States v. Kelly**, D.C. Mo., 92 F.Supp. 672.

gerprint experts, he was appointed (under the Act) too late to effectively utilize defense experts since appellant was entitled to have such witnesses not only testify on his behalf but also be present at the time the government experts were on the stand.

Appellant argues the purpose of the Act cannot be carried out if the accused is not afforded a sufficient opportunity to take advantage of the Act's provisions. Appellant further mentions that he was at a distinct disadvantage because his defense was alibi and mistaken identity, and most of the alibi witnesses were in Denver.[6]

Appellant concedes in his reply brief that they do not at any time challenge the competency of John Goodwin, the trial attorney for Ray.

Counsel presumably argues that they could not obtain adequate expert or investigative services, more particularly fingerprint experts, in time for adequate presentation of appellant's defense. Theoretically, appellant says, since trial counsel was appointed belatedly he, thereby, was denied rights under §§ (e). However, a complete analysis of the Criminal Justice Act, as set forth in the legislative history as well as in the Act itself, fails to show that any accused is given any greater substantive right under the

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[6]Appellant claims that he had affidavits of some 40 witnesses which would verify he was in Denver throughout the fall of 1963. These witnesses did not appear. Appellant did bring his wife, several sister-in-laws and brother-in-laws from Denver. Also he produced a Continental Airline employee from Los Angeles, who formerly worked in Denver.

Such a contention overlooks Rules 15(c) and 17(b) of the Fed. R. Crim. P. Upon counsel's ex parte application, within the court's discretion, depositions could have been taken, or subpoenas issued, all at government expense, see discussion, infra, n. 12.

Act than he previously had. See Vol. 2 U.S. Code Cong. & Adm. News, p. 2990.[7]

The fundamental purpose of the Criminal Justice Act is to provide legal assistance to indigent defendants in criminal cases.[8] See Preamble to Criminal Justice Act of 1964, Pub. Law 99-455, 78 Stat. 552, 18 U.S.C. 3006A; Criminal Justice Act of 1964, Honorable James A Carter, 36 F.R.D. 67.

An indigent represented thereunder is not provided any procedural rights of discovery or defenses. The Criminal Justice Act is a means of implementing what the courts have declared to be a constitutional demand (right of counsel) under the Sixth Amendment and its inclusion in the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335; *Douglas v. California,* 372 U.S. 353. Serious "equal protection" questions would arise if the Act provided indigents with rights the non-indigent defendant would not have.

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[7]For a most thorough and excellent discussion, see Kutak, Criminal Justice Act of 1964, 44 Nebr. L. Rev. 703 (1966). See p. 737 where the Allen Committee Report discusses §§(e). Such report states:

> "* * * the absence of a provision for defense services is 'a fundamental deficiency of the present system,' which reaches 'serious proportions.' The plan provides that counsel, whether appointed for or retained by a defendant who is financially unable to obtain the services other than counsel necessary to an adequate defense, may request them in an ex parte application to the court. The ex parte nature of the application will insure that the defendant will not have to disclose his defense prematurely. Although the legislative history is replete with references to these services, no exhaustive description of them has been found. The Allen Committee Report refers to counsel having at his disposal the 'tools essential to conduct a proper defense,' and later specifically mentions 'investigatory services, the assistance of experts, transcripts of proceedings and the like.'"

We agree the implementation of such services is now more readily provided. However, such services were available to the indigent before the passage of the Act. See discussion in re **Bandy v. United States,** 8 Cir., 296 F.2d 882, infra.

[8]"The sine qua non of the Criminal Justice Act of 1964 is participation by competent counsel." **Kutak, supra,** 44 Nebr. L. Rev. 703 at 732.

In *King v. United States,* 355 F.2d 500 (1966), the court presented a similar idea when it expressed disapproval of the lower court's order to the government to produce their file on the defendant for the use of his court-appointed counsel. The court said:

> "The rights of a defendant are not to be determined on an ad hominem basis with respect to his counsel, whether because, as the court observed in this case, he is believed 'reliable', or, as the court stated was its practice, by distinguishing between court-appointed and counsel the defendant personally chooses. There should be no special relationship between court-appointed counsel and the court and no special favors. Quite apart from which would seem to us the obvious inequity, the court's practice might well cause defendants who otherwise would not have done so, to seek court-appointed counsel, thereby increasing the government's financial burden under the Criminal Justice Act." (n. 2, p. 702)

Possibly appellant is arguing that he was denied the right of "effective assistance of counsel" under the Sixth Amendment to the Constitution because his trial counsel did not have timely opportunity to present the proper defense. *Powell v. Alabama,* 287 U.S. 45. This was the approach taken in the case of *United States v. Germany,* 32 F.R.D. 421 (1963). There the court ordered that the court-appointed counsel was entitled to reimbursement for reasonable and necessary expenses in traveling to interview and depose an informer and view the scene of the alleged crime. The Department of Justice would not honor the order. The court held the defendant was thereby denied his constitutional right to counsel and dismissed the indictment. The court stated:

> "This Court believes that, without more, upon a certification of a court-appointed counsel for an indigent defendant to the effect that it is reasonably necessary for him to incur expenses for traveling and for subsistence in viewing the scene of the alleged crime and in interviewing material witnesses, the 'effective assistance of counsel' mandate requires that the money for said reasonably necessary travel and subsistence expenses be made available to him by the United States. However, this Court believes that Rule 15(c) of the Federal Rules of Criminal Procedure *bolsters* the contention of the defendant, Ned Germany, in this case that his counsel is entitled to reimbursement for the expenses necessarily incurred by him in rendering 'the effective' representation as required by the Sixth Amendment to the Constitution."

Assuming appellant's argument is intended to encompass this theory, it is misplaced. Trial counsel did not at any time request handwriting or fingerprint experts before, during or after the trial. *Bandy v. United States,* 8 Cir., 296 F.2d 882. We are only left to speculate why. There probably was good reason.[9]

We have thoroughly examined the record concerning the cross examination of government experts. It is taxing credulity to say trial counsel was "caught by surprise"

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[9]Many reasons could exist for counsel's not calling either a fingerprint or handwriting expert: (a) It may have been impossible to obtain experts to disagree with the government's statements as a matter of scientific evidence or (b) at best such witnesses could say nothing more than what counsel achieved in the cross examination of the government expert when the latter admitted in the "final analysis it was for the jury to decide" whether or not the prints were the same, or (c) Mr. Goodwin being a competent trial counsel (which appellant concedes) determined it would be better to break down the government witnesses on cross examination than weaken his case by bringing in defense experts who possibly could be discredited completely by the government.

by such evidence. His cross examination demonstrates a thorough technical knowledge of the subject.[10]

However, whether counsel was forewarned or not makes little difference. He certainly had full knowledge of such evidence prior to presenting his case-in-chief. Yet no request to hire experts was made. Appellant claims, however, retaining an expert at the time of Goodwin's reappointment under the Act would have been a futile gesture since the defense expert should have been in court at the time of the actual testimony of the government's witnesses.[11] Such a quixotic contention hardly merits discussion. We know of nothing under the Federal Rules of Criminal Procedure or the Criminal Justice Act now or at any time which would provide the defendant with this as a matter of right. Furthermore, such prearranged presence could hardly be deemed indispensable to the testimony of an expert in the defense case-in-chief.

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[10]Mr. Goodwin's cross examination of Simeon Wilson included the following questions: Q. You don't know what type fingerprints he has, whether he has **whorls or arches** or—what are the other things? Q. You don't even know what his **fingerprint style** is, do you sir? Q. What percentage of the people would you say in this courtroom have got whorl type fingerprints? . . . Q. And a **bifurcation** simply means where two lines join, two of these ridges join? Q. And you expect if you have the others present in the print you would have to have some bifurcations, wouldn't you? Q. I seem to have **read or heard some place** sir, that it requires at least **13 identifications or pecularities** of a print to have an opinion on it . . .

The cross examination of Mr. Mooney , the other fingerprint expert, includes the following questions: Q. You mean to say that you know of no process which by the **use of aminoacid could transfer that print?** Q. Is there to your knowledge any international agreement with reference to fingerprints? Q. Fingerprinting was originated where? Q. Where was fingerprinting first used? Q. Where was this whole system first used? Q. **Are you sure it wasn't England?** Q. The first method of identification the English used wasn't it? Q. Did you know under that system doesn't it require a **minimum of 13 points of identification?** (our emphasis)

[11]If the lack of knowledge prevented timely motion, it remains unanswered why appellant did not call handwriting experts. Government handwriting experts appeared at the first trial. These assuredly were as significant and important as the fingerprint experts.

This claim also fallaciously assumes appellant could not obtain such services before the implementation of the Criminal Justice Act. The benefits granted under §§ (e) of the Criminal Justice Act are similar to Rules 17(b) and 15(c) of the Federal Rules of Criminal Procedure. Each of these provisions relate to funds for indigents to secure witnesses for trial. In *Bandy v. United States,* supra, at 888, Judge, now Chief Judge, Vogel, said:

> "* * * We agree with *United States v. Fox,* D.C.S.D. N.Y., 1937, 19 F.Supp. 463, that handwriting experts are included under Rule 17(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Had Bandy employed a handwriting expert, his services would have been paid for in accordance with the order of the District Court."

If such services were deemed necessary, appellant could have made a request to the court[12] without being reappointed under the Criminal Justice Act. Yet the record is absent any request made and as such the matter must be deemed intelligently waived. *Bandy v. United States,*

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[12]Clearly no substantive rights are granted defendants under Rule 17(b) nor do we interpret the Criminal Justice Act as providing any. In **Reistroffer v. United States,** 258 F.2d 379, 8 Cir. 1958, this court denied defendant's request to subpoena a handwriting expert to testify on his behalf. On review the court stated:

> "It is well settled that Rule 17(b), Federal Rules of Criminal Procedure, 18 USCA, under which the motion for subpoena was made, **does not accord the indigent defendant an absolute right to subpoena witnesses** at government expense. There is and must be wide discretion vested in the District Court to prevent the abuses often attempted by defendants. This Court will not disturb the exercise of the discretion unless exceptional circumstances compel it."

District Judge Robert Van Pelt in **United States v. Pope,** 251 F. Supp. 234, interpreted §§ (e) as follows:

> "The Criminal Justice Act contemplates that counsel should be afforded fullest opportunity to prepare their case; the rule in allowing defense services is that judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony."

supra (waived right to handwriting expert when no request was made under 17(b); *Mark v. United States,* 8 Cir., 326 F.2d 481, cert. denied 377 U.S. 947 (right to speedy trial waived by defendant unless asserted in some manner); *United States v. Miller,* 2 Cir., 246 F.2d 486 (alleged defect in indictment waived by failure to raise by pre-trial motion); *Ford v. United States,* 5 Cir., 201 F.2d 300 (waived statutory disqualification by juror, even though not known by counsel at trial); *Edwards v. United States,* 8 Cir., 333 F.2d 588 (contentions not brought to attention of trial court are waived unless record disclosed plain error affecting substantial rights).

The courts must presume that trial counsel pursues the course of action at the trial he feels best for his client, and absent plain error involving substantial rights his client is bound by the counsel's choice. *United States v. Handy,* 130 F.Supp. 270, aff'd 224 F.2d 504, aff'd 351 U.S. 454 (1955), where the court said at page 295:

> "Defendant's counsel apparently made a deliberate choice not to seek delay or a change of venue. Many reasons could be suggested for their decision. We will not indulge in speculation. At all events there was a waiver of any right they may have had."

In *Shibley v. United States,* 237 F.2d 327, cert. denied, 352 U.S. 873, reh den 352 U.S. 919 (1956), the court said that "One cannot speculate upon failure to call a witness and thereafter present such testimony as newly discovered," at 332. See also: *United States v. Marachowsky,* 213 F.2d 235 (1954), cert. denied 348 U.S. 826; *Blodgett v. United States,* 161 F.2d 47 (1947); *Apel v. United States,* 247 F.2d 277 (1957).

This court cannot but observe appellant wears shoes similar to a party seeking a new trial on newly discovered

evidence under Rule 33. Such evidence not only must be material, but it must be shown that on a new trial it would probably produce an acquittal. *McCroskey v. United States,* 339 F.2d 385, 387 (8 Cir. 1965); *Ferina v. United States,* 302 F.2d 95, cert. denied 371 U.S. 819 (8 Cir. 1962); *Connelly v. United States,* 271 F.2d 333, cert. denied 362 U.S. 936 (8 Cir. 1959); *Edgar v. Finley,* 312 F.2d 533 (8 Cir. 1963).

In *United States v. Keller,* 145 F.Supp. 692 (1956), the defendant moved for a new trial on the basis that, among other things, the statement of a handwriting expert was new evidence which exculpated him from his conviction for aiding and abetting in filing a false FHA certificate. The court held that this evidence did not justify a new trial because, in part, it was not newly discovered: "The entire issue of the authenticity of the signatures on the FHA Completion Certificate was joined when Ginter denied forging the document . . . Ginter's testimony was taken on the first day of the trial, *yet defendant made no request to adjourn in order to obtain the services of a handwriting expert.*" (Emphasis ours)

Under Rule 33, assuming appellant could produce witnesses contradicting government fingerprint experts, clearly a new trial could not be granted. Such allowance would bring no end of litigation. Hindsight can always produce other witnesses who *could* have been called to corroborate evidence presented. Certainly appellant does not have any better standing than a movant under Rule 33. We do not see how appellant's position is enhanced raising the issue on a direct appeal for the first time, when we necessarily cannot even know what such experts might say.

We emphasize, however, trial counsel is not to be criticized. In an adversary proceeding the lawyer is the

master of his client's case. He guides the course of the trial, always with the utmost allegiance to his client's cause. His skill and competence are his tools. His decision becomes his client's command, his judgment must necessarily guide his client's destiny. When the verdict is in, his only reward may well be satisfaction in rendering his all for the cause. A lawyer's actions under fire should not be measured by hindsight speculation. The jury resolved the case unanimously against the defendant. The examination of the entire record shows trial counsel did everything within his best judgment to provide appellant with a fair trial. We fail to see how any rights were denied the appellant.

Judgment affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Appendix C

JUDGMENT

United States Court Of Appeals

For The Eighth Circuit

No. 18,235 — September Term, 1966.

Loyd Carl Ray, Appellant,

vs.

United States of America.

Filed October 21, 1966, Robert C. Tucker, Clerk.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Loyd Carl Ray, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

October 21, 1966

Appendix D

United States Court Of Appeals

For The Eighth Circuit

No. 18,235 — September Term, 1966.

Loyd Carl Ray, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 22, 1966

Appendix E

United States Court Of Appeals

For The Eighth Circuit

No. 18235

Loyd Carl Ray, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 28, 1966